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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000988-MR

TERESA GAIL SHOWN — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 03-CI-00221

ROBERT TODD SHOWN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Teresa Gail Shown appeals from orders of the Ohio Circuit Court in a divorce action determining that Robert Todd Shown's Kentucky Teachers' Retirement System (KTRS) account is exempt from division as marital property pursuant to KRS[1] 161.700. She argues that the exemption provided in that statute is limited pursuant to the 1996 amendment of KRS 403.190(4). We disagree and thus affirm.

[1] Kentucky Revised Statutes.

Teresa and Robert were married on April 5, 1986. They separated on June 21, 2003, and Robert filed a petition for dissolution of marriage in the Ohio Circuit Court on August 4, 2003. Robert was employed by the Ohio County Board of Education as a teacher, and Teresa was employed as a dental hygienist.

Robert's KTRS account was valued as of June 30, 2003, at $81,410.27. Teresa had a Fidelity SEP-IRA valued as of December 31, 2003, at $1,895.97. Robert argued to the circuit court that his KTRS account was exempt pursuant to KRS 161.700. Teresa argued that only the portion of Robert's account up to the amount of her IRA was excepted from division as marital property. Teresa relied on the 1996 amendment to KRS 403.190(4), but the court concluded that KRS 161.700 controlled. Thus, the court determined that Robert's KTRS account was exempt from division as marital property, and it awarded the value of the entire account to him. It is also awarded Teresa's SEP-IRA account to her as her separate property. This appeal by Teresa followed.

KRS 161.700(2) relates to teachers' retirement, and it states in pertinent part:

> Retirement allowance, disability allowance, accumulated contributions, or any other benefit under the retirement system shall not be classified as marital property pursuant to KRS 403.190(1). Retirement allowance, disability allowance, accumulated contributions, or any other benefit under

> the retirement system shall not be considered as an economic circumstance during the division of marital property in an action for dissolution of marriage pursuant to KRS 403.190(1)(d).[2]

Before the 1996 amendment of KRS 403.190(4), that statute provided in pertinent part, as it does now, as follows:

> If the retirement benefits of one spouse are excepted from classification as marital property . . . then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be.

Id.

In 1995, this court considered a case similar to this one in Turner v. Turner, 908 S.W.2d 124 (Ky.App. 1995). In that case, the appellant was a schoolteacher with a teachers' retirement account, and the appellee was an ironworker who also had a retirement plan with his employer. Although the amount in their respective accounts was not stated in the court's opinion, it is clear that the appellee's account was in excess of that of the appellant's teachers' retirement account.

The appellant in Turner argued that any of the appellee's retirement account in excess of her teachers' retirement account should be considered divisible marital property. This court held, however, that the appellant's retirement funds were exempted from distribution as marital

[2] KRS 403.190(1) requires a court in a divorce proceeding to divide marital property in just proportions.

property pursuant to KRS 161.700(2), and that the appellee's retirement funds were therefore likewise exempt under KRS 403.190(4). Id. at 125. The court reasoned that "[b]oth KRS 161.700(2) and KRS 403.190(4) are unambiguous in their language leaving no doubt that the legislature intended to exempt, as marital property, the entire pensions of a teacher and his/her spouse upon divorce." Id. The court further held that the result in the case was apparently inequitable, but that it was "up to the legislature and not this court to correct the problem." Id.

In response to the inequitable result in the Turner case, in 1996 the legislature amended KRS 403.190(4). In pertinent part, the amendment stated, "[h]owever, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse." The fact situation before this court is opposite from that in the Turner case. Here, the value of the teachers' retirement fund is much greater than that of the party with the nonexempt fund. There is no published opinion in this state addressing this fact situation. Thus, this is a case of first impression for Kentucky courts.

There is a conflict between KRS 161.700(2) and KRS 403.190(4). The former statute deals specifically with the treatment of retirement funds accrued under the KTRS during

divorce proceedings. The latter statute deals generally with the treatment of retirement funds in divorce proceedings when one spouse's fund is exempted.

In reviewing these statutes, we note that "[t]he construction and application of statutes is a matter of law and may be reviewed *de novo*." Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transp. Cabinet, 983 S.W.2d 488, 490 (Ky. 1998). Furthermore, "[w]hen there appears to be a conflict between two statutes, as here, a general rule of statutory construction mandates that the specific provision take precedence over the general." Commonwealth v. Phon, 17 S.W.3d 106, 107 (Ky. 2000).

Under the plain meaning of KRS 161.700(2), benefits accrued under the KTRS "shall not be classified as marital property pursuant to KRS 403.190(1)." In other words, such benefits are exempt from division as marital property in divorce proceedings. See Waggoner v. Waggoner, 846 S.W.2d 704, 708 (Ky. 1992). However, under KRS 403.190(4) "the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse." The conflict between the two statutes is obvious.

KRS 161.700(2) is more specific than KRS 403.190(4). Therefore, under the general rule of statutory construction that requires that the specific provision take precedence over the general provision, KRS 161.700(2) controls. See Phon, 17 S.W.3d

at 107. In short, the circuit court did not err in determining that Robert's teachers' retirement account is fully exempt from division as marital property.

As further support for our conclusion, we note that two amendments were made to KRS 161.700 after the effective date of the amendment to KRS 403.190(4), neither of which addressed the portion of KRS 161.700 in question herein. In 1998, the legislature amended KRS 161.700(2) in such a way as to make KTRS pension benefits subject to attachment for child support. In 2002, another amendment changed the word "teacher" to "member." Significantly, the amendments omitted any language permitting attachment for either court-ordered division of marital property or maintenance.

Justice Cooper, in a concurring opinion in Holman v. Holman, 84 S.W.3d 903, 912 (Ky. 2002), recognized an omission of this nature as a clear indication of legislative intent. Recognizing that "[t]he role of the Court in construing a legislative act is to effectuate the intent of the legislature[,]"[3] this omission serves to support our conclusion that Robert's teachers' retirement account is fully exempt from division as marital property.

We do not decide whether the result herein is deemed inequitable as it was by the court in the Turner case. The

[3] See Magic Coal Co. v. Fox, 19 S.W.3d 88, 94 (Ky. 2000).

legislature, in its discretion, has the authority to determine what constitutes marital property, and it chose to insulate teachers' retirement funds from the division of marital property in divorce proceedings. See Waggoner, supra. This legislative act was apparently based on the fact that teachers are the only public employees not covered by the Social Security system. Id. As noted by the court in the Turner case, any inequity in the result in cases such as this is a matter to be considered by the legislature and not the courts. See Turner, 908 S.W.2d at 125.

Finally, Robert argues in the alternative that even if KRS 403.190(4) is to be applied, then the value of his retirement account, which exceeds the value of Teresa's retirement account, is still fully exempt from division as marital property because Teresa's retirement account does not qualify as retirement benefits as defined under KRS 403.190(4). The pertinent portion of the applicable statute provides that:

> Retirement benefits, for the purposes of this subsection shall include retirement or disability allowances, accumulated contributions, or any other benefit of a retirement system or plan regulated by the Employees Retirement Income Security Act of 1974, or of a public retirement system administered by an agency of a state or local government, including deferred compensation plans created pursuant to KRS 18A.230 to 18A.275 or defined contribution or money purchase plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended.

KRS 403.190(4). Teresa's SEP-IRA does not qualify as a plan regulated by ERISA,[4] is not a public retirement plan regulated by a state or local government, and is not a plan qualified under Section 401(a) of the Internal Revenue Code.[5] Thus, because Teresa has not demonstrated that her retirement plan falls within the meaning of "retirement benefits" as defined in KRS 403.190(4), we agree with Robert that Teresa cannot use her SEP-IRA as an offset pension triggering KRS 403.190(4).[6]

The orders of the Ohio Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Candy Yarbray Englebert Owensboro, Kentucky	Gregory B. Hill Hartford, Kentucky

[4] A key requirement for plans qualified under ERISA is that they include an anti-alienation provision. See In re: Watson, 192 B.R. 238, 242 (Bankr. D.Nev. 1996). IRAs are not required to have an anti-alienation provision. See Smith v. Winter Park Software, Inc., 504 So.2d 523, 524 (Fla. Dist. Ct. App. 1987).

[5] SEP-IRAs are defined under Internal Revenue Code § 408(a) and (b). See U.S.C. § 408(k).

[6] Nevertheless, the circuit court awarded Teresa her SEP-IRA as her separate property, and Robert did not appeal from that award.